

1994

Terrorism on the Playground: What Can Be Done?

Stacey R. Rinestine

Follow this and additional works at: <https://dsc.duq.edu/dlr>



Part of the [Law Commons](#)

Recommended Citation

Stacey R. Rinestine, *Terrorism on the Playground: What Can Be Done?*, 32 Duq. L. Rev. 799 (1994).
Available at: <https://dsc.duq.edu/dlr/vol32/iss4/7>

This Comment is brought to you for free and open access by Duquesne Scholarship Collection. It has been accepted for inclusion in Duquesne Law Review by an authorized editor of Duquesne Scholarship Collection.

Terrorism on the Playground:¹ What Can Be Done?

A terrorist is running rampant in America's schools. It knows no racial, ethnic, or religious boundaries and causes severe emotional harm to its victims. The schools are aware of its existence; however, the terror goes largely unchecked. Effects of its reign are profound and lasting, with dire consequences for the victims. Stable, confident, and academically successful students are psychologically and academically crippled while the schools stand by and watch. This terrorist is creating an enormous problem for American children and it is only recently that schools and society alike have begun to recognize its existence. This terrorist is peer sexual harassment.

Over the past few years, American society has been told that sexual harassment will not be tolerated; but this message has been almost exclusively geared toward the work environment. Now that society has been informed about sexual harassment, many people have begun to realize that it no longer is limited to the employment context. In fact, sexual harassment is thriving in America's schools. It exists in a form that would never be tolerated in the workplace today and, yet, very few are doing anything to curb its growth. Children are forced to deal with situations² that many adults could not handle, and are suffering severe emotional and academic problems as a result.

This comment attempts to accomplish three things by address-

1. Andrea Atkins, *Sexual Harassment in School: Is Your Child at Risk?* BETTER HOMES AND GARDENS, Aug. 1992, at 32, 34 (quoting Nancy Stein, Ed. D., of the Wellesley College's Center for Research on Women, Wellesley, Mass. in which she called peer sexual harassment "terrorism on the playground.").

2. Students have reported the following in a recent survey conducted by *Seventeen* magazine:

You're walking down the hall and a guy comes up behind you and snaps your bra or even gropes your breast; a guy leers at you, grabs his crotch Marky-Mark-style, and says, "Do me"; . . . your name shows up on a list being passed around labeled "Piece of ass of the week"; you are cornered by a guy who whispers obscenely about what he wants to do to you. Some of you even reported being assaulted or raped.

Adrian Nicole LeBlanc, *Harassment at School: The Truth Is Out*, SEVENTEEN, May, 1993, at 134, 134.

ing the problem of sexual harassment among students. First, it will establish that sexual harassment is a pervasive problem in America's schools. Second, this comment will discuss the law of sexual harassment focusing on Title VII of the Civil Rights Act of 1964³ ("Title VII") and Title IX of the Educational Amendments Act of 1972⁴ ("Title IX") with an eye toward establishing whether a cause of action exists under Title IX for student-to-student sexual harassment. Finally, it will suggest alternative solutions, namely policies and procedures that schools can adopt and follow in order to protect children from sexual harassment and to insulate themselves from liability.

I. THE PROBLEM

The reports of sexual harassment among students are growing and the behavior reported is astonishing. In one case, a five-year old Minnesota boy led a female classmate into the art resource room, pulled down both of their pants, jumped on top of her and began to simulate sexual intercourse.⁵ Boys are snapping girls' bras and grabbing girls' breasts as they walk down the hall.⁶ Lists are being circulated of the twenty-five girls the boys would most like to have sexual intercourse with;⁷ and, in one elementary school, every Friday is "Flip-up Day," when the boys pull up the girls' skirts.⁸ While these isolated incidents may not be sufficient to establish the existence of a problem, recent studies also indicate that sexual harassment in the schools is on the rise.

One study, commissioned by the American Association of University Women Educational Foundation ("AAUW"),⁹ indicated that four out of five, or eighty-one percent, of the students, in grades eight through eleven have experienced some form of sexual harassment¹⁰ while in school,¹¹ and, not surprisingly, the majority

3. 42 U.S.C. §§ 2000e-2000e-17 (1988).

4. 20 U.S.C. § 1681(a) (1988).

5. Ruth Shalit, *Romper Room: Sexual Harassment—By Tots*, THE NEW REPUBLIC, Mar. 29, 1993, at 13.

6. LeBlanc, cited at note 2, at 134.

7. Atkins, cited at note 1, at 32.

8. *Id.* at 34.

9. THE AMERICAN ASSOCIATION OF UNIVERSITY WOMEN EDUCATIONAL FOUNDATION, *HOSTILE HALLWAYS: THE AAUW SURVEY ON SEXUAL HARASSMENT IN AMERICA'S SCHOOLS* (1993) [hereinafter *HOSTILE HALLWAYS*].

10. Sexual harassment was defined as "unwanted and unwelcome sexual behavior which interferes with your life. Sexual harassment is not behaviors that you like or want." *HOSTILE HALLWAYS*, cited at note 9, at 6 (emphasis omitted).

11. *Id.* at 4-5. The survey asked the students the following question:

of the students who were harassed were victims of peer sexual harassment.¹² Additionally, the survey indicated that the first time a student is most likely to be harassed is during the formative junior high school years, or between sixth and ninth grade,¹³ and that the harassment is taking place primarily in the hallways and classrooms.¹⁴

Even more appalling than the fact that the conduct exists is the effect that it has on its victims. The AAUW survey indicated that many students, following a harassing incident, did not want to attend school and suffered embarrassment and loss of self-confidence.¹⁵ Twenty-three percent of the students reported that they did not want to talk as much in class following the experience,¹⁶ and, emotionally, nearly sixty-three percent of the girls harassed suffered embarrassment as a result of the conduct.¹⁷ On the whole,

During your whole school life, how often, if at all, has anyone (this includes students, teachers, other school employees, or anyone else) done the following things to you when you did not want them to?

- Made sexual comments, jokes, gestures, or looks.
- Showed, gave, or left you sexual pictures, photographs, illustrations, messages, or notes.
- Wrote sexual messages/graffiti about you on bathroom walls, in locker rooms, etc.
- Spread sexual rumors about you.
- Said you were gay or lesbian.
- Spied on you as you dressed or showered at school.
- Flashed or "moon"ed" you.
- Touched, grabbed, or pinched you in a sexual way.
- Pulled your clothing in a sexual way.
- Intentionally brushed against you in a sexual way.
- Pulled your clothing off or down.
- Blocked or cornered you in a sexual way.
- Forced you to kiss him/her.
- Forced you to do something sexual, other than kissing.

Id. at 5 (emphasis omitted).

12. *Id.* at 11. Nearly four in five, or seventy-nine percent, of the harassed students "have been targeted by a current or former student at the school—86% of the girls and 71% of the boys." *Id.*

13. *Id.* at 7.

14. *Id.* at 13. Sixty-six percent of the harassed students have been harassed in the hallway at least once, and more than fifty-five percent have been harassed in the classroom. *Id.* Out of these groups, girls are overwhelmingly the most likely targets in these areas (seventy-three percent of the girls compared with fifty-eight percent of the boys have been harassed in the hallways; and sixty-five percent of the girls and forty-four percent of the boys have been harassed in the classroom.). *Id.*

15. HOSTILE HALLWAYS, cited at note 9, at 15. Nearly one in four students, or twenty-three percent, reported that they felt this way. *Id.*

16. *Id.*

17. *Id.* at 16. Compare this to the fact that only thirty-six percent of the boys suffered embarrassment. *Id.*

the study indicated that the girls were more seriously affected than the boys. This is illustrated by the statistics that the AAUW presented. Compare the fact that fifty-two percent of the girls felt self-conscious after they were subjected to harassing behavior with the forty-three percent of the boys who felt the same way.¹⁸ Additionally, the girls tended to respond that they were "very upset" or "somewhat upset" by the harassment more frequently than the boys.¹⁹

What do these statistics mean? They clearly indicate that girls are suffering emotional and psychological affects as a result of the harassing behavior that schools are allowing to continue. These effects, in turn, have profound and lasting consequences on the students' futures because during the crucial years of adolescence students choose courses that will affect the development of their careers. If a student has high self-confidence and esteem, then that student will tend to engage in more challenging academic pursuits. However, if a student lacks self esteem, that student will eventually begin to doubt his or her academic capabilities and opt for a less challenging course of study, which in turn will lead to diminished career opportunities. In fact, in another study, the AAUW found that "the educational aspirations and career goals of girls and boys can be traced to a gender gap in self-esteem that widens during their school years."²⁰ "Self-esteem shapes a person's ambitions and actions. And low self-esteem shrinks a person's future."²¹

18. *Id.* at 17.

19. HOSTILE HALLWAYS, cited at note 9, at 17. When asked how they felt immediately following the harassment, seventy percent of the girls responded that they were "very upset" or "somewhat upset" as compared to only twenty-four percent of the boys. *Id.* One sixteen-year old female stated that the harassing activity made her "'feel that a woman isn't worth much.'" *Id.* at 18. Another eighteen-year old female stated that "'[t]he experience was unnerving. I was rattled. I felt insecure and vulnerable at school, which should be a safe place for learning.'" *Id.* at 22. Compare this with the response of a fifteen-year old male who stated that the conduct "'[m]ade [him] feel great that someone like[d] [him].'" *Id.* at 20. Another male, age fourteen, stated: "'I don't care. People do this stuff every day. No one feels insulted by it. That's stupid. We just play around. *I think sexual harassment is normal.*"' *Id.* at 24 (emphasis added).

20. AMERICAN ASSOCIATION OF UNIVERSITY WOMEN, SHORTCHANGING GIRLS, SHORTCHANGING AMERICA: A CALL TO ACTION 10 (1991) [hereinafter SHORTCHANGING GIRLS]. The nationwide survey found that:

[sixty] percent of elementary school girls and 69 percent of elementary school boys say that they're "happy the way I am"— a key indicator of self-esteem. By high school, girls' self-esteem falls 31 percent to 29 percent, while boys self-esteem falls only 23 percent to 46 percent— an increase from 7 points to 17 points in the gender gap on this measure of self-esteem.

Id.

21. SHORTCHANGING GIRLS, cited at note 20, at 23. The AAUW states that:

Therefore, by allowing sexual harassment to continue during this crucial period, society is hindering the professional development of thousands of young women.

Knowing the effects of sexual harassment, one would expect that both the schools and the community would be outraged to hear that it exists in the schools; however, this is not so. Take for example an incident that occurred in Minnesota when fifteen-year old Kathi Vonderharr and her parents filed charges against three youths who had sexually assaulted Kathi.²²

The assault occurred when Kathi attended a youth hockey tournament with a friend and her friend's family.²³ Kathi, her friend, and her friend's brother were in a motel room when several boys knocked on the door.²⁴ Her friend's brother knew the boys and let them in.²⁵ When Kathi was sitting on the bed, three of the boys pulled up her blouse, pulled down her pants and began to fondle her while the other boys watched.²⁶ The boys finally left, but the three who assaulted Kathi came back and again attacked her.²⁷ Kathi did not report this incident for a week, but upon learning that the boys were bragging that they had had intercourse with her, she told her parents who then filed charges.²⁸

Immediately following the filing of the charges,²⁹ members of the hockey association began to call the Vonderharrs to remind them that "boys will be boys" and to convince them to drop the charges.³⁰ Even though two of the boys pled guilty to, and the

Low self-esteem leads to lack of self-confidence, which, in turn, leads to lowered aspirations. And that makes someone aim lower and achieve less in school, in the workplace, and throughout her life As girls grow up, they lose self-confidence in their abilities, expect less from life, and lose interest in challenging courses of study and rewarding careers, particularly pursuits involving mathematics and science.

Young girls are confident, assertive, and feel authoritative about themselves. But they emerge from adolescence with a poor self-image, constrained views of their future, and a lack of confidence in their abilities.

Id. at 23-24.

22. JoAnn Strauss, *Peer Sexual Harassment of High School Students: A Reasonable Student Standard and An Affirmative Duty Imposed on Educational Institutions*, 10 *LAW & INEQUALITY* 163, 164 (1992) (relying on Doug Grow, *Suicide Ended Kathi's "Fight for Dignity"*, *MINNEAPOLIS STAR TRIBUNE*, July 5, 1987, at 1A.).

23. Strauss, cited at note 22, at 163.

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. Strauss, cited at note 22, at 163-64.

29. Two of the boys pled guilty to fourth degree assault and the third was found guilty of the same offense. *Id.* at 164.

30. *Id.*

other was found guilty of, fourth degree assault they became "hockey heroes" with articles appearing in the school and local newspapers, and the yearbook.³¹

On the other hand, Kathi was an outcast.³² Her classmates taunted her by calling her a "slut," "bitch," and "whore."³³ Her locker was vandalized and the vice principal of the school refused to remedy the situation.³⁴ Kathi endured these taunts until June 17, 1987, almost two years after the assault, when she committed suicide at the age of eighteen.³⁵ Given the reaction of the community and the parents in this situation, it is understandable why sexual harassment is rampant in America's schools.

When viewing peer sexual harassment then, one must keep in mind not only the conduct of the perpetrator, but also the effect on the victim and the potential reaction of the community and the student body. The battleground for peer sexual harassment is not pretty for its victim; but the only way that sexual harassment can be stopped is to implement policies and procedures to protect the victims, and punishment for those who choose to ignore its existence. Title IX has the potential to serve as a punishment for those who choose to disregard sexual harassment as a pervasive problem in the schools. It also will provide an incentive for schools to implement their own policies and procedures for handling peer sexual harassment.

II. SEXUAL HARASSMENT DEFINED

Before any meaningful discussion of sexual harassment can be undertaken, one must first understand what sexual harassment is. Sexual harassment is a broad term that is used to encompass many types of behavior.³⁶ As such, it is difficult to formulate a precise

One caller said to Mrs. Vonderharr, 'Don't you remember when you were sixteen? You liked that when boys did that to you. You may have slapped their face, but you liked it My sons bring girls to the house all the time and I know they do that and I know the girls like it.'

Id.

31. *Id.* "One article had the school hockey coach speaking of the two boys' 'hungry' and 'aggressive' styles." *Id.*

32. *Id.*

33. *Id.*

34. Strauss, cited at note 22, at 164. "'Kill the bitch, she took our friends to court,'" appeared on Kathi's locker and the vice principal refused to take care of the graffiti saying, "I've got 200 kids who were late for school. I've got to arrange their detention. Clean the locker yourself." *Id.*

35. *Id.*

36. One commentator has said that:

definition. The Equal Employment Opportunity Commission ("EEOC") has defined workplace sexual harassment as "[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature" which is made a term or condition of employment, or as the basis for an employment decision.³⁷ Such unwelcome conduct is also included as sexual harassment if it "unreasonably interferes with an individual's work performance" or creates "an intimidating, hostile or offensive working environment."³⁸ The problem with sexual harassment cases is that no single definition of sexual harassment is uniformly used. However, the gravamen of sexual harassment is that it involves "unwelcome conduct" of a sexual nature performed by one who is in a position of *power* over the victim.³⁹ This power exploitation can be found not only in the employer/employee or teacher/student context, but it has its origins in the general power imbalance between men and women in society.⁴⁰ Therefore, any

Sexual harassment may range from verbal innuendo to overt conduct, from requests for acquiescence in sexual relations to rape. Explicitly or implicitly threatened consequences may or may not materialize following failure to comply with sexual demands. Any viable definition of sexual harassment must be broad enough to encompass such diversified behavior, but precise enough to establish clear standards of prohibited conduct.

Ronna Greff Schneider, *Sexual Harassment and Higher Education*, 65 TEX. L. REV. 525, 533 (1987).

37. 29 C.F.R. § 1604.11(a) (1992).

38. *Id.*

39. Several commentators have stated that sexual harassment is not so much about sex as it is about the exploitation of power. See, e.g., *Sexual Harassment Claims of Abusive Work Environment Under Title VII*, 97 HARV. L. REV. 1449 (1984) [hereinafter *Abusive Work Environment*]. One commentator defines sexual harassment as:

[T]he exploitation of a powerful position to impose sexual demands or pressures on an unwilling but less powerful person. As an abuse of power that discriminates against members of a discrete and vulnerable group, sexual harassment violates the civil rights of its victims . . . [and] encompasses a broad range of behavior, from unsolicited sexual comments to repeated sexual assaults.

Id. at 1451. See also Jolynn Childers, Note, *Is There a Place for a Reasonable Woman in the Law? A Discussion of Recent Developments in Hostile Environment Sexual Harassment*, 42 DUKE L.J. 854, 863-72 (1993). Ms. Childers states that "[t]he hostile environment cases all contain this basic issue: Is [p]ower, by men over women, being used in a sexually exploitative or discriminatory way in the workplace?" *Id.* at 871. Further, she states that "[s]exual harassment is less an issue about sex than it is an issue of power. It is an injury to an individual in a specific context, but it is also an injury to a woman because she is a member of a large group of 'women'." *Id.* at 870.

See also CATHARINE MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN I* (1979) (defining sexual harassment as "the unwanted imposition of sexual requirements in the context of a relationship of unequal power.").

40. See Childers, cited at note 39, at 863; *Abusive Work Environment*, cited at note 39, at 1452.

workable definition of hostile environment sexual harassment must take into consideration not only the conduct itself, but also the power differential between the harasser and the harassee.⁴¹

In 1981, the Office for Civil Rights ("OCR") of the U.S. Department of Education promulgated its own definition of sexual harassment.⁴² This definition, however, did nothing to protect the rights of students to be free from peer sexual harassment and was instead aimed at harassing conduct of employees or agents of a recipient of federal financial assistance. There is no definition of student-to-student sexual harassment currently in use. However, in its 1993 survey, the AAUW defined peer sexual harassment as "unwanted and unwelcome sexual behavior which interferes with your life."⁴³

Although there is no one definition of sexual harassment, the federal courts and commentators have generally recognized two distinct types of sexual harassment. Both types have been recognized in the employment context under Title VII; however, under Title IX, only one of these types is uniformly recognized.

The first category of sexual harassment is referred to as quid pro quo harassment. This type of harassment occurs when one person tries to compel another's submission to sexual demands by the conditioning of a reward or punishment on the victim's submission or failure to submit.⁴⁴ "The coercion may be explicit or implicit."⁴⁵ Quid pro quo harassment is uniformly accepted as a cause of action under Title IX.

The second category of sexual harassment is what has been re-

41. This problem is a separate issue and has been written on extensively by several commentators. This issue leads to such questions as "whose point of view is to be used in analyzing the abusive conduct?" For an extensive discussion of what standard is to be utilized in hostile environment cases, see Childers, cited at note 39; *Abusive Work Environment*, cited at note 39; Walter Christopher Arber, Note, *A Step Backward For Equality Principles: The "Reasonable Woman" Standard In Title VII Hostile Work Environment Sexual Harassment Claims*, 27 GA. L. REV. 503 (1993).

42. Monica L. Sherer, *No Longer Just Child's Play: School Liability Under Title IX for Peer Sexual Harassment*, 141 U. PA. L. REV. 2119, 2126 (1993) (citing OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., *SEXUAL HARASSMENT: IT'S NOT ACADEMIC 2* (1986)). The OCR defines sexual harassment as follows: "[s]exual harassment consists of verbal or physical conduct of a sexual nature, imposed on the basis of sex, by an employee or agent of a recipient that denies, limits, provides different, or conditions the provision of aid, benefits, services or treatment protected under Title IX." Sherer, 141 U. PA. L. REV. at 2126 (quoting OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., *SEXUAL HARASSMENT: IT'S NOT ACADEMIC 2* (1986)).

43. *HOSTILE HALLWAYS*, cited at note 9, at 6.

44. Schneider, cited at note 36, at 535.

45. *Id.*

ferred to as "hostile" or "abusive" environment harassment. In the academic context, an atmosphere is "hostile" when it becomes "so hostile, offensive, or intimidating to the student that she is unable to receive the full academic benefits to which she is entitled."⁴⁶ It is under the hostile environment realm that peer sexual harassment falls, and it is here that the courts are reluctant to extend Title IX coverage.

Given that many of the Title IX cases have turned to the hostile environment case law found under Title VII, one must first have a general understanding of where hostile environment harassment stands under Title VII before any discussion of Title IX can be undertaken. The next section of this comment gives a brief overview of the Supreme Court cases in this area.⁴⁷

III. TITLE VII AND SEXUAL HARASSMENT

Title VII of the Civil Rights Act of 1964⁴⁸ was intended to prevent discrimination on the basis of race, sex, religion, color, and national origin in the workplace. It provides employees with remedies for discrimination affecting the "terms, conditions, or privileges" of their employment.⁴⁹ While Title VII did not explicitly provide for sexual harassment claims, the courts and the EEOC have established that sexual harassment is a legitimate cause of action under Title VII.

In 1980, the EEOC officially announced a set of guidelines defining "sexual harassment."⁵⁰ These guidelines, although they do not

46. *Id.* at 536.

47. This comment does not attempt to fully develop the Title VII hostile environment cases. However, for a full discussion of the law as it stands under Title VII, see Childers, cited at note 39; Joshua F. Thorpe, *Gender-Based Harassment and the Hostile Work Environment*, 1990 DUKE L.J. 1361 (1990); *Abusive Work Environment*, cited at note 39.

48. 42 U.S.C. §§ 2000e-2000e-17 (1988).

49. Title VII subsection (a) provides in pertinent part:

It shall be an unlawful employment practice for an employer— (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a)(1).

50. 29 C.F.R. § 1604.11(1) (1991). The EEOC guidelines provide as follows:

Harassment on the basis of sex is a violation of section 703 of title VII. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the

have the effect of law,⁵¹ have been explicitly relied upon by the courts in making sexual harassment decisions. The result has been the recognition by both the guidelines and the courts of the two categories of sexual harassment: quid pro quo and hostile environment.

The Supreme Court first recognized hostile environment sexual harassment in 1986 when it decided the case of *Meritor Savings Bank v. Vinson*.⁵² In *Meritor*, the plaintiff, a former employee of the defendant bank, brought an action against the bank and her supervisor alleging that she had been "constantly subjected to sexual harassment" by her supervisor during the four years that she had worked at the bank.⁵³ Testimony indicated that, during the course of the plaintiff's four year-term of employment, she had had intercourse with her supervisor some forty or fifty times and that the supervisor fondled her in front of other employees, exposed himself to her, and on several occasions, raped her.⁵⁴

The Supreme Court first rejected the defendants' argument that Title VII's focus was limited to "economic" or "tangible" discrimination.⁵⁵ The Court found that "[t]he phrase 'terms, conditions, or privileges of employment' evinces a congressional intent 'to strike at the entire spectrum of disparate treatment of men and women' in employment."⁵⁶ Additionally, the Court found that the EEOC guidelines support the view that Title VII can be violated without economic injury to the harasser.⁵⁷

purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive work environment.
29 C.F.R. § 1604.11(a) (footnote omitted).

51. See *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986). The Supreme Court stated that: "As an 'administrative interpretation of the Act by the enforcing agency,' . . . these Guidelines, 'while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which the courts and litigants may properly resort for guidance.'" *Meritor*, 477 U.S. at 65 (citations omitted).

52. 477 U.S. 57 (1986).

53. *Meritor*, 477 U.S. at 60. The plaintiff sought injunctive relief in addition to compensatory and punitive damages and attorney's fees. *Id.*

54. *Id.*

55. *Id.* at 64.

56. *Id.* (quoting *Los Angeles Dep't of Water and Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978) (quoting *Sprogis v. United Airlines, Inc.*, 444 F.2d 1194, 1198 (7th Cir. 1971))).

57. *Id.* at 65. The Court, in finding that hostile environment sexual harassment is actionable under Title VII, stated that:

[T]he phrase "terms, conditions or privileges of employment" in [Title VII] is an expansive concept which sweeps within its protective ambit the practice of creating a working environment heavily charged with ethnic or racial discrimination One can readily envision working environments so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group

Although holding that hostile environment sexual harassment is actionable under Title VII,⁵⁸ the Court stated that in order for such a claim to be actionable "it must be sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment'."⁵⁹ The "voluntariness" of the sex-related conduct, however, is not a defense to a sexual harassment action.⁶⁰ "The gravamen of any sexual harassment claim is that the alleged sexual advances were 'unwelcome'."⁶¹

The *Meritor* decision left open many questions in the hostile environment arena; namely, what must be proven before conduct is sufficiently severe or pervasive so as to alter the conditions of employment and create an abusive work environment?⁶² Recently, the Supreme Court addressed the question of whether conduct, to be actionable as hostile environment sexual harassment, must "'seriously affect [an employee's] psychological well-being' or lead the plaintiff to 'suffe[r] injury.'"⁶³ The Court, in *Harris v. Forklift Systems, Inc.*, reaffirming *Meritor*, stated that the standard used in determining whether conduct is sufficiently severe to alter the conditions of employment is essentially a "middle path" between

workers. . . .

Id. at 66 (quoting *Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972)).

58. *Meritor*, 477 U.S. at 73. The Court adopted the rationale of the Eleventh Circuit when it stated that:

Sexual harassment which creates a hostile or offensive environment for members of one sex is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality. Surely, a requirement that a man or woman run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest of racial epithets.

Id. at 66-67 (quoting *Henson v. Dundee*, 682 F.2d 897, 902 (11th Cir. 1982)).

59. *Meritor*, 477 U.S. at 67 (citations omitted). The Court found that the allegations of the plaintiff in this case included conduct that was "not only pervasive harassment but also criminal conduct of the most serious nature" and were "plainly sufficient to state a claim for 'hostile environment' sexual harassment." *Id.*

60. *Id.* at 68.

61. *Id.* (emphasis added) ("The correct inquiry is whether [a plaintiff] by her conduct indicated that the alleged sexual advances were unwelcome, not whether her actual participation in sexual intercourse was voluntary.").

62. One of the areas of confusion centers on what standard is to be used by the trier of fact to evaluate the conduct and the resulting abusive work environment. Two different standards are currently being implemented: the objective, gender neutral standard and a gender-based or the reasonable woman standard. A discussion of the current arguments for and against each standard is beyond the scope of this comment and will not be addressed. For a detailed discussion of the differing standards see Childers, cited at note 39; Arber, cited at note 39.

63. *Harris v. Forklift Systems, Inc.*, 114 S. Ct. 367 (1993) (citation omitted).

requiring "tangible psychological injury" and allowing recovery for "any conduct that is merely offensive."⁶⁴ In rejecting the district court's requirement of tangible psychological harm, the Court found that to require such harm in hostile environment cases would go against the broad rule of workplace equality established by Title VII.⁶⁵ "So long as the environment would reasonably be perceived, and is perceived, as hostile or abusive, . . . there is no need for it also to be psychologically injurious."⁶⁶

While recognizing that the test that it had established was not "mathematically precise," the Court stated that the determination of whether a hostile environment exists is to be made by looking at the totality of the circumstances.⁶⁷ Factors to be considered are: the frequency of the discriminatory conduct; the severity of the conduct; whether the conduct is a mere offensive utterance or is physically threatening or humiliating; and whether the employee's work performance is unreasonably interfered with as a result.⁶⁸ No single one of these factors is required for determining that a hostile work environment existed.⁶⁹

While Title VII and sexual harassment is fairly settled with regard to the types of sexual harassment that are covered, i.e., quid pro quo and hostile environment, this is not so for Title IX. Keeping the above in mind, the next section of this comment will delve into Title IX in an attempt to provide a background to the courts' treatment of sexual harassment under this Title and will analyze whether a legitimate cause of action for student-to-student sexual harassment is available under Title IX.

64. *Harris*, 114 S. Ct. at 370.

65. *Id.* at 370-71. The Court found that:

Title VII comes into play before the harassing conduct leads to a nervous breakdown. A discriminatorily abusive work environment, even one that does not seriously affect employees' psychological well-being, can and often will detract from employees' job performance, discourage employees from remaining on the job, or keep them from advancing their careers. Moreover, even without regard to these tangible effects, the very fact that the discriminatory conduct was so severe or pervasive that it created a work environment abusive to employees because of their race, gender, religion, or national origin offends title VII's broad rule of workplace equality.

Id.

66. *Id.* at 371.

67. *Id.*

68. *Id.*

69. *Harris*, 114 S. Ct. at 371. The Court did not completely eliminate considering the effect of such conduct on the employee's psychological well-being. Instead, it said that such a consideration is "relevant to determining whether the plaintiff actually found the environment abusive." *Id.*

IV. TITLE IX AND SEXUAL HARASSMENT

A. *Statutory History of Title IX*

Title IX of the Educational Amendments Act of 1972 prohibits sexual discrimination by any federally-assisted educational program.⁷⁰ Enacted in 1972 as a response to sex discrimination in education, Title IX was designed to accomplish two distinct, but related, objectives.⁷¹ First, it was intended to deny federal financial assistance to those education institutions that engage in sexually discriminatory practices.⁷² Second, Title IX was intended to protect individuals from such discrimination.⁷³ The power to enforce Title IX has been explicitly given to federal agencies and departments that have the ability to extend federal financial assistance to educational activities or programs, with the Department of Education (the "Department") being primarily responsible for enforcing the statute.⁷⁴ Title IX also gives the Department the power to terminate federal financial funding to institutions that violate the statute.⁷⁵ However, before such funding may be terminated, notice of violation must be given to the offending institution.⁷⁶ The Department must also give the institution an opportunity to voluntarily remedy its noncompliance.⁷⁷

The Supreme Court has noted that the first purpose of Title IX

70. 20 U.S.C. § 1681(a) (1988). Title IX provides in pertinent part: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance" 20 U.S.C. § 1681(a).

71. *Cannon v. University of Chicago*, 441 U.S. 677, 704 (1979).

72. *Cannon*, 441 U.S. at 704. Regarding Title IX, U.S. Representative Mink stated that:

Any college or university which has [a] . . . policy which discriminates against women applicants . . . is free to do so under [Title IX] but such institutions should not be asking the taxpayers of this country to pay for this kind of discrimination. Millions of women pay taxes into the Federal treasury and we collectively resent that these funds should be used for the support of institutions to which we are denied equal access.

Id. at 704 n.36 (citing 117 CONG. REC. 39,252 (1971)).

73. *Cannon*, 441 U.S. at 704. U.S. Senator Bayh stated that "[Title IX] is a strong and comprehensive measure which . . . is needed if we are to provide women with solid legal protection as they seek education and training for later years" *Id.* at n.36 (quoting 118 CONG. REC. 5806-07 (1972)).

74. 20 U.S.C. § 1682 (1988). Since the time of enactment of the Department of Education Organization Act, the Department of Education is primarily responsible for granting most of the federal financial assistance to educational institutions. *Grove City College v. Bell*, 687 F.2d 684, 688 & n.3 (3d Cir. 1982), *aff'd*, 465 U.S. 555 (1984).

75. 20 U.S.C. § 1682.

76. *Id.*

77. *Id.*

is typically served through the termination of federal financial assistance as provided for under the statute.⁷⁸ However, because that remedy is utilized only in rare circumstances, it does not adequately accomplish Title IX's second objective of protecting the individual.⁷⁹ Therefore, in order to accomplish the goals of Title IX, the Supreme Court, in *Cannon v. University of Chicago*,⁸⁰ made clear that there is an implied private cause of action under Title IX.⁸¹

Following *Cannon*, Title IX sex discrimination cases were few because the Supreme Court, while allowing a private cause of action, did not hold that compensatory relief was also available to plaintiffs in a Title IX situation. This, however, has changed. In *Franklin v. Gwinnett County Public Schools*, the Supreme Court held that a plaintiff could recover damages in an action brought to enforce Title IX.⁸² Through this decision, the Supreme Court has potentially opened the flood-gates making Title IX a powerful weapon against sex discrimination in an academic setting. However, many questions remain unanswered. Namely, does Title IX apply to hostile environment harassment and, if so, what does a plaintiff need to prove in order to recover for student-to-student sexual harassment?

B. *Title IX and Hostile Environment Sexual Harassment*

While the recognition of quid pro quo sexual harassment has been for the most part uneventful,⁸³ the extension of school liabil-

78. *Cannon*, 441 U.S. at 704.

79. *Id.* at 705.

80. 441 U.S. 677 (1979).

81. *Cannon*, 441 U.S. at 705.

82. 112 S. Ct. 1028 (1992). *Franklin* resolved a conflict among the Third, Seventh, and Eleventh Circuits regarding the issue of whether compensatory damages were available under Title IX. Compare *Pfeiffer v. Marion Center Area Sch. Dist.*, 917 F.2d 779 (3d Cir. 1990); *Lieberman v. University of Chicago*, 660 F.2d 1185 (7th Cir. 1981); *Franklin v. Gwinnett County Pub. Sch.*, 911 F.2d 617 (11th Cir. 1990).

83. The Second Circuit was the first court to recognize quid pro quo harassment in Title IX cases. In *Alexander v. Yale University*, the district court, while acknowledging that quid pro quo harassment was recoverable, refused to extend hostile environment sexual harassment into the Title IX realm. 459 F. Supp. 1 (D. Conn. 1977), *aff'd on other grounds*, 631 F.2d 178 (2d Cir. 1980). The district court stated that:

[I]t is perfectly reasonable to maintain that academic advancement conditioned upon submission to sexual demands constitutes sex discrimination in education, just as questions of job retention or promotion tied to sexual demands from supervisors have become increasingly recognized as potential violations of Title VII's ban against sex discrimination in employment When a complaint of such an incident is made, university inaction then does assume significance, for on refusing to investigate, the

ity into the hostile environment arena has not been as successful. Courts facing the issue of whether hostile environment harassment is recoverable under Title IX have been, for the most part, inconsistent. While the majority of the circuits appear to allow recovery in this area, a few have not, and many have not addressed the issue yet. This means that hostile environment sexual harassment is still open for debate when it comes to Title IX recovery, particularly when it involves student-to-student situations.

The first court to allow recovery for hostile environment sexual harassment under Title IX was *Lipsett v. University of Puerto Rico*.⁸⁴ In *Lipsett*, the plaintiff was both an employee and a student who alleged that hospital supervisory personnel had subjected her to an atmosphere of sexual harassment at the hospital.⁸⁵ The First Circuit looked to Title VII for guidance in determining the standard to be used in deciding Title IX sex discrimination cases.⁸⁶ The court, however, limited its use of Title VII to the employment context.⁸⁷ In doing so, it recognized hostile environment sexual harassment and stated that the plaintiff, to make out a case, must show that his or her working or educational environment was altered due to being subjected to unwelcome sexual advances that were severe or pervasive.⁸⁸ The court essentially used the *Meritor* test. *Lipsett*, however, is of limited use when looking at sexual harassment claims of students, but it is important because the court relied upon the guidelines of the EEOC, and because it also implicitly ruled that Title IX prohibitions are coextensive with Title VII's.⁸⁹

The first federal court to specifically recognize hostile environment sexual harassment in a purely educational context was the

institution may sensibly be held responsible for condoning or ratifying the employee's invidiously discriminatory conduct.

Alexander, 459 F. Supp. at 4. Rejecting recovery for hostile environment sexual harassment under Title IX, the district court stated that "[n]o judicial enforcement of Title IX could properly extend to such imponderables as atmosphere or vicariously experienced wrong" *Id.* at 3.

84. 864 F.2d 881 (1st Cir. 1988).

85. *Lipsett*, 864 F.2d at 886.

86. *Id.* at 896-98. The court relied upon the EEOC guideline entitled "Procedures for Complaints of Employment Discrimination Filed Against Recipients of Federal Financial Assistance" and on the legislative history of Title IX "which strongly suggests that Congress meant for similar substantive standards to apply under Title IX as had been developed under Title VII." *Id.* at 897.

87. *Id.* at 897.

88. *Id.* at 898.

89. *Id.* at 896-97.

District Court for the Eastern District of Pennsylvania in *Moire v. Temple University School of Medicine*.⁹⁰ In *Moire*, the plaintiff was a medical student at Temple University School of Medicine from February of 1977 through May of 1982.⁹¹ She alleged that, while in her third year at Temple, she failed her clerkship as a result of certain incidents of sexual harassment perpetrated upon her by her supervisor.⁹² She further blamed the failure on efforts of colleagues and Temple faculty members to protect him.⁹³ The plaintiff alleged that her supervisor's conduct toward her "created a sexually harassing, discriminatory atmosphere" and that "Temple officials conspired to maintain such an environment in violation of her rights"⁹⁴

In reaching its decision, the court first defined sexual harassment as "the unwanted imposition of sexual requirements in the context of a relationship of unequal power."⁹⁵ The conditioning of academic advancement upon submission to sexual pressures, according to the district court, constituted sexual discrimination in the academic environment because "such treatment demeans and degrades women."⁹⁶ However, the court found that there was no allegation of quid pro quo harassment in this case and determined that the issue for resolution was whether the plaintiff was in a harassing or abusive environment due to her sex.⁹⁷ While the court noted that "the sexual harassment 'doctrine' has generally been developed in the context of Title VII," it found that the EEOC's 1980 Guidelines on Sexual Harassment were equally applicable in a Title IX context.⁹⁸ Therefore, the court affirmatively recognized that both types of sexual harassment are actionable under Title IX, becoming the first federal court to do so.

Until recently, *Moire* was the only federal decision holding that hostile environment sexual harassment was proscribed by Title IX.⁹⁹ However, in July of 1993, the District Court for the Northern

90. 613 F. Supp. 1360 (E.D. Pa. 1985), *aff'd*, 800 F.2d 1136 (3d Cir. 1986).

91. *Moire*, 613 F. Supp. at 1362.

92. *Id.* at 1365.

93. *Id.* at 1362.

94. *Id.* at 1366.

95. *Id.* (citing CATHERINE MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN* 1 (1979)).

96. *Moire*, 613 F. Supp. at 1366.

97. *Id.* at 1366-67.

98. *Id.* at 1366-67 n.2 (stating that "the [EEOC's] 1980 Guidelines on Sexual Harassment explicitly recognize these two types of harassment . . . these guidelines seem equally applicable to Title IX.") (citations omitted).

99. In 1989, the United States District Court for the Western District of Pennsylva-

District of California held that Title IX permits a plaintiff to state a claim for hostile environment sexual harassment.¹⁰⁰ In *Patricia H. v. Berkeley Unified School District*, the plaintiffs, Patricia H. and her two daughters, Jackie and Rebecca, alleged that the two girls were subjected to a hostile educational environment due to the continuing presence of a teacher who had sexually molested them.¹⁰¹ They further alleged that the school district failed to adequately respond to the situation and take the necessary steps required under Title IX.¹⁰² The court stated that the school district's liability in this situation was based upon: (1) a finding of a hostile environment; and (2) the school district's "knowing failure to act."¹⁰³ The defendants argued that Title IX does not proscribe hostile environment sexual harassment and, therefore, the legislature and not the court should act to extend the scope of Title IX.¹⁰⁴ In reaching its determination that Title IX is applicable in hostile environment cases, the court looked to Title VII, particularly the court looked to *Meritor* and the recent Supreme Court

nia held that it is clear that Title IX reaches claims for quid pro quo sexual harassment but stated that:

[T]o suggest . . . that unwelcome sexual advances, from whatever source, official or unofficial, constitute Title IX violations is a leap into the unknown which, whatever its wisdom, is the duty of Congress or an administrative agency to take. Title IX simply does not permit a "hostile environment" claim as proscribed for the workplace by 29 C.F.R. § 1604.11(a)(3).

Bougher v. University of Pittsburgh, 713 F. Supp. 139, 145 (W.D. Pa. 1989), *aff'd on other grounds*, 882 F.2d 74 (3d Cir. 1989).

100. *Patricia H. v. Berkeley Unified Sch. Dist.*, 830 F. Supp. 1288, 1293 (N.D. Cal. 1993).

101. *Patricia H.*, 830 F. Supp. at 1296. With regard to Rebecca's action, the complaint alleged that because of the teacher's presence, Rebecca's school reports had shown a steady decline "into scholastic failure." *Id.* at 1298. Rebecca also alleged that on occasion she saw the teacher on school grounds while she was attending junior high in the Berkeley Unified School District. *Id.* As a result, she fled both her school and her home, and was unable to attend her regular school within the district. *Id.* She further alleged that her schooling was disrupted due to these incidents and that she was forced to transfer out of the school into private schools and eventually to special education programs due to her declining academic performance. *Id.*

102. *Id.* at 1297.

103. *Id.* at 1297. The court stated that:

An employer is liable if it fails to take "immediate and appropriate" action "reasonably calculated" to remedy the harm complained of Just as the Gwinnett school district could be liable after Franklin complained and received no help, and Ellison's employer could be liable for its subpar efforts on her behalf, the [Berkeley Unified School District] may be liable if it failed to take reasonable steps to aid Jackie H. and Rebecca H.

Id. (citing *Franklin v. Gwinnett County Pub. Schools*, 112 S. Ct. 1028 (1992); *Ellison v. Brady*, 924 F.2d 872 (9th Cir. 1991)).

104. *Patricia H.*, 830 F. Supp. at 1291.

decision in *Franklin*.¹⁰⁵ The court specifically noted that, while *Franklin* did not address the issue of the relationship between Title VII and Title IX with regard to hostile environment sexual harassment, the Supreme Court did use the body of law under Title VII to explain its ruling on the harassment claim.¹⁰⁶ The district court found that "a student should have the same protection in the school that an employee has in the workplace" and, also, relied upon Title VII in reaching its decision.¹⁰⁷

In developing a standard to be applied in academic hostile environment cases, the court adopted the "reasonable victim" approach promulgated by the OCR.¹⁰⁸ With regard to whether the plaintiffs suffered from a hostile environment due to the molestation, the court found that the question of whether a reasonable student of the plaintiffs' ages would find the teacher's mere presence to create a hostile environment was a jury question and not for the court to decide.¹⁰⁹

105. *Id.* at 1290-92.

106. *Patricia H.*, 830 F. Supp. at 1292. Specifically, the Supreme Court stated that: Unquestionably, Title IX placed on the Gwinnett County Schools the duty not to discriminate on the basis of sex, and "when a supervisor sexually harasses a subordinate on the basis of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex." . . . We believe the same rule should apply when a teacher sexually harasses and abuses a student.
Franklin, 112 S. Ct. at 1307 (citing *Meritor*, 477 U.S. at 64).

107. *Patricia H.*, 830 F. Supp. at 1292 (citing *Doe v. Taylor Indep. Sch. Dist.*, 975 F.2d 137, 149 (5th Cir. 1992) (decided under the Fourteenth Amendment)). The district court opined that "[t]he distinctions between the school environment and the workplace serve only to emphasize the need for zealous protection against sex discrimination in the schools" *Patricia H.*, 830 F. Supp. at 1292-93. Furthermore,

Parents, guardians, and the children themselves have little choice but to rely on the school officials for some measure of protection and security while in school and can reasonably expect that the state will provide a safe school environment. To hold otherwise would call into question the constitutionality of compulsory attendance statutes, for we would be permitting a state to compel parents to surrender their offspring to the tender mercies of school officials without exacting some assurance from the state that school officials will undertake the role of guardian that parents might not otherwise relinquish, even temporarily.

Id. at 1293 n.6 (citing *Doe v. Taylor Indep. Sch. Dist.*, 975 F.2d 137, 147 (5th Cir. 1992)).

108. *Patricia H.*, 830 F. Supp. at 1296. The OCR stated that:

[W]hen considering whether an actionable hostile environment has been created in an educational setting, the determining body should consider "the age of the victim(s); the frequency, duration, repetition, location, severity, and scope of the acts of harassment; [and] the nature or context of the incidents," in essence using a "reasonable student" standard.

Id. (quoting Request for Judicial Notice, Ex. N at 2).

109. *Patricia H.*, 830 F. Supp. at 1297. Additionally, the court found that the liability of the school district hinged upon a finding of fact regarding whether or not the school district took appropriate action under the circumstances. *Id.* The court also refused to find

The most recent case to allow recovery for hostile environment sexual harassment under Title IX is *Doe v. Petaluma City School District*.¹¹⁰ This case, however, went much further than recognizing hostile environment claims under Title IX. It is also, and more importantly, the first case to rule on whether a student may recover against a school district for injuries sustained as a result of student-to-student sexual harassment.

C. *Doe v. Petaluma City School District*

Until August of 1993, no court had ruled on the issue of whether student-to-student sexual harassment is recoverable under Title IX. However, in August, the United States District Court for the Northern District of California was faced with this issue for the first time. Given that this is the first case of this type, a detailed description of the decision is in order.

1. Facts

In mid-fall, 1990, the plaintiff, who was in the seventh grade in the defendant school district, was first faced with the harassing activity, which was manifested mainly through verbal actions.¹¹¹ The harassment began when two male students approached the plaintiff and said "I hear you have a hot dog in your pants."¹¹² Within a few weeks after this initial comment, other students were approaching the plaintiff and rumors were spreading about the plaintiff and hot dogs.¹¹³ In response to the verbal harassment, the plaintiff spoke with her counselor, Mr. Homrighouse, and asked him to stop the harassment.¹¹⁴ Mr. Homrighouse did nothing.¹¹⁵ Over the course of the semester the plaintiff continued to endure the rumors and verbal harassment, speaking with Mr.

that Rebecca and Jackie's claims were nonjusticiable. It stated that Rebecca's complaint was not limited to prospective relief because considerable impact on Rebecca's life was alleged. *Id.* at 1298-99. It said that Rebecca "should not be punished for a hostile environment so severe that she was forced out entirely by loss of her legal claim against those responsible for the situation." *Id.* at 1299. Furthermore, the court said that Jackie's complaint was not moot even though she had already graduated. *Id.* at 1298. The court stated that the fact of graduation only rendered Jackie's claim for prospective relief moot and not her claim for damages. *Id.*

110. 830 F. Supp. 1560 (N.D. Cal. 1993).

111. *Petaluma City Sch. Dist.*, 830 F. Supp. at 1564.

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

Homrighouse approximately every other week.¹¹⁶ During these meetings, he failed to inform the plaintiff about the school's Title IX Student/Parent Grievance Policy or tell the plaintiff about the Title IX officer at the school; however, he did tell the plaintiff that he could warn the students about the behavior.¹¹⁷

As the harassment continued throughout the fall, the plaintiff's father and mother spoke with Mr. Homrighouse about the situation.¹¹⁸ He told the plaintiff's parents that he was aware of the situation, and that he would take care of everything.¹¹⁹ He also stated that some of the kids needed time adjusting to junior high and that he expected the harassment to stop within a short time.¹²⁰ Again, Mr. Homrighouse did not inform the plaintiff's parents about the grievance procedure or about the Title IX coordinator.¹²¹

The harassment continued to escalate throughout the semester, and by December of 1990 the plaintiff's father was again forced to speak with Mr. Homrighouse because the plaintiff was being harassed by certain girls in her class who threatened her because she had reported the harassment.¹²² Mr. Homrighouse spoke to these girls and told the plaintiff's father that everything had been taken care of; but the harassment continued.¹²³

In the spring of 1991, references were still being made with regard to the plaintiff and hot dogs.¹²⁴ Once again the plaintiff reported her concerns to Mr. Homrighouse and asked that he stop the harassment by certain female students.¹²⁵ In response to the plaintiff's request, Mr. Homrighouse stated that girls could not sexually harass other girls, and, therefore, they could not get into trouble.¹²⁶ He further told the plaintiff that all that he could do was warn the students.¹²⁷ Mr. Homrighouse also told the plaintiff's

116. *Petaluma City Sch. Dist.*, 830 F. Supp. at 1564.

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. *Petaluma City Sch. Dist.*, 830 F. Supp. at 1564.

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.* at 1565. The female students continued to harass the plaintiff by calling her a "hot dog bitch," "slut," and "hoe" in attempts to get the plaintiff to fight with them. *Id.* When the plaintiff complained to Mr. Homrighouse he told her that "he could not stop the girls from talking to [the plaintiff] because of their free speech rights." *Id.* Even though he was aware that the plaintiff was upset and frightened, he once again did nothing to stop the harassing activities. *Id.*

126. *Petaluma City Sch. Dist.*, 830 F. Supp. at 1565.

127. *Id.*

father, with regard to the harassment being perpetrated by the boys, that "boys will be boys."¹²⁸

As the harassing behavior continued into the fall of 1991, the plaintiff's eighth grade year, going to school became emotionally difficult for the plaintiff, forcing her mother to again speak with Mr. Homrighouse who stated that there was little that he could do because no one had actually physically harmed the plaintiff.¹²⁹ He still did not inform the plaintiff's family about the Title IX grievance policy or coordinator.¹³⁰

In January of 1992, the plaintiff was slapped by another student.¹³¹ This incident was the first to be reported to the school's vice principal and Title IX coordinator.¹³² However, the coordinator was still not apprised of the situation fully until she attended a meeting with the plaintiff's father and Mr. Homrighouse on February 21, 1992, following an incident that occurred during the plaintiff's English class.¹³³ At this time the coordinator asked why she had never been informed of the situation. Mr. Homrighouse indicated that he "didn't feel it was important."¹³⁴

Following this meeting,¹³⁵ the harassing incidents continued until March of 1992 when the plaintiff's parents transferred her to another public school.¹³⁶ However, because the harassment continued there, the plaintiff was eventually forced to attend a private girls' school at her parents' expense.¹³⁷

The plaintiff filed suit against the defendants¹³⁸ for their failure

128. *Id.*

129. *Id.*

130. *Id.*

131. *Petaluma City Sch. Dist.*, 830 F. Supp. at 1565.

132. *Id.*

133. *Id.* Apparently, a young man in the plaintiff's class stood up and said: "This question is for [the plaintiff]. Did you have sex with a hot dog?" *Id.* The teacher made the student apologize to the plaintiff, but the plaintiff left the room in tears. *Id.*

134. *Id.* at 1565. Additionally, by this point, the plaintiff had stopped going to the bathroom while at school because student-written comments were on the bathroom walls everyday. *Id.*

135. Two additional incidents led to the eventual transfer of the plaintiff. On February 24, 1992, while buying her lunch in the school cafeteria, two boys commented about the plaintiff's preference for Oscar Meyer hot dogs and whether the plaintiff wanted them cooked or frozen. *Id.* This incident was reported to the Title IX coordinator who suspended the boys for two days. *Id.* The second episode of harassment took place on February 28, 1992, when a female student approached the plaintiff and attempted to initiate a fight. *Id.* School officials stepped in and the event was also reported to the coordinator. *Id.*

136. *Petaluma City Sch. Dist.*, 830 F. Supp. at 1566.

137. *Id.*

138. The plaintiff sued the Petaluma City School District, the Petaluma Joint Union High School District, Richard Homrighouse, Kenilworth Junior High School, and the princi-

to end the sexual harassment inflicted upon her by her peers.¹³⁹ The defendants filed a motion to dismiss the plaintiff's claims, arguing among other things, that Title IX does not apply to hostile environment sexual harassment, and that, even if Title IX did apply, the plaintiff failed to allege that the defendants intended to discriminate against her.¹⁴⁰

2. Holding

The court held that Title IX does apply to hostile environment sexual harassment but stated that, for a plaintiff to recover damages, as opposed to declaratory or injunctive relief, she must "allege and prove intentional discrimination on the basis of sex by an employee of the educational institution."¹⁴¹

In addressing whether Title IX applies to hostile environment claims, the court looked to the decisions of other federal courts on the issue and made specific reference to the decision in *Patricia H.*, which was decided by another judge in the same district.¹⁴² The district court stated *Patricia H.* relied upon four factors in reaching its decision that Title IX applies to hostile environment sexual harassment. First, it looked to the legislative history behind Title IX which indicated that Title IX was patterned after Title VII.¹⁴³ Second, the district court noted that *Patricia H.* paid particular

pal of Kenilworth Junior High. *Id.* at 1560.

139. *Id.* at 1563.

140. *Id.* at 1571. Before reaching the Title IX claims, the court was forced to decide whether or not the plaintiff's federal claims were timely filed. Given that Title IX does not have its own statute of limitations, the court looked to the California Code of Civil Procedure, as is required by the Supreme Court, to determine what the applicable statute of limitation would be in Title IX cases. *Id.* at 1566 (citing *Wilson v. Garcia*, 471 U.S. 261 (1985)). Under California law, the statute of limitation period applicable in Title IX situations is one year, therefore, the defendants claimed that the plaintiff's cause of action was time barred. *Id.* In finding that the cause of action was timely, the court stated that it could not say, from the face of the complaint, that no violation of federal statute occurred within one year from the time that the complaint was filed. *Id.* Additionally, the court found that, because of the plaintiff's minor status, the federal claims were tolled under the California Code of Civil Procedure § 352(a)(1). *Id.* at 1569-70. Finally, the court held that the plaintiff may have been able to proceed on a "continuing violation theory." *Id.* at 1567. The court stated that "a plaintiff satisfies the statute of limitations if she shows 'a series of related acts, one or more of which falls within the limitations period, or the maintenance of a discriminatory system both before and during the [limitations] period.'" *Id.* (citations omitted).

141. *Petaluma City Sch. Dist.*, 830 F. Supp. at 1571. ("To obtain damages, it is not enough that the institution knew or should have known of the hostile environment and failed to take appropriate action to end it.").

142. *Id.* at 1571-73.

143. *Id.* at 1572.

attention to the Supreme Court's reliance on Title VII in its decision in *Franklin*.¹⁴⁴ Third, reference was made to other Title IX employment discrimination cases that adopted Title VII standards.¹⁴⁵ Finally, the court noted that *Patricia H.* also relied upon the current policy of the OCR which applies Title VII standards to Title IX claims.¹⁴⁶

While the court found that hostile environment harassment is actionable under Title IX, it did note that no court has ever ruled on the issue of student-to-student sexual harassment.¹⁴⁷ However, the court looked to the opinions of the OCR and discovered that the OCR believed that "an educational institution's failure to take appropriate response to student-to-student sexual harassment of which it knew or had reason to know is in violation of Title IX."¹⁴⁸ The court then went on to generally state that *Franklin* was a hostile environment case and that to deny recovery under the hostile environment theory would "violate the Supreme Court's command to give Title IX a sweep as broad as its language."¹⁴⁹

Given the above, it was clear to the court that, in the situation at bar,¹⁵⁰ the plaintiff was "'denied a benefit[] of, or subjected to discrimination under an education program on the basis of sex.'"¹⁵¹ Based on its findings, the court held that hostile environment sexual harassment, including student-to-student harassment, is a legitimate cause of action under Title IX; however, in order for a private plaintiff to recover compensatory damages, intentional

144. *Id.*

145. *Id.* (citing *Lipsett v. University of Puerto Rico*, 864 F.2d 881 (1st Cir. 1988); and *Mabry v. State Bd. of Community Colleges and Occupational Educ.*, 813 F.2d 311 (10th Cir.), *cert. denied*, 484 U.S. 849 (1987)).

146. *Petaluma City Sch. Dist.*, 830 F. Supp. at 1572.

147. *Id.* at 1573.

148. *Id.* (citations omitted).

149. *Id.* at 1575. The court stated that:

Surely one is "denied the benefits of, or subjected to discrimination under" an education program on the basis of sex when, as alleged [in this case], she is driven to quit an education program because of the severity of the sexual harassment she is forced to endure in the program. That does not mean, however, that the educational institution will always be liable for damages as a result of hostile environment sexual harassment. "Whether a litigant has a cause of action is 'analytically distinct and prior to the question of what relief, if any, a litigant is entitled to receive.'"

Id. (quoting *Guardians Ass'n v. Civil Serv. Comm'n of New York*, 463 U.S. 582, 595 (1983) (citations omitted)).

150. The court made it clear, however, that it did "not mean to indicate . . . that an actionable hostile environment does not exist unless the environment is so bad that the action feels compelled to quit the institution." *Petaluma City Sch. Dist.*, 830 F. Supp. at 1575 n.10.

151. *Id.* (citation omitted).

discrimination must be alleged and proven.¹⁵²

In reaching its decision that "intent" is a prerequisite in any Title IX claim for damages, the court, noting that Title IX is to be interpreted in a manner similar to that employed in Title VI cases,¹⁵³ relied on the Supreme Court's holding in *Guardians Association v. Civil Service Commission of New York*.¹⁵⁴ In *Guardians Association*, the Supreme Court held that, under a Title VI cause of action, a plaintiff must show discriminatory intent in order to recover compensatory damages.¹⁵⁵ The Supreme Court limited re-

152. *Id.* at 1576.

153. Title VI provides: "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d (1988).

"Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, and section 504 of the Rehabilitation Act of 1973 are often referred to as sister statutes because they were modelled after one another and contain identical enforcement schemes." Kelly S. Terry, *Franklin v. Gwinnett County Public Schools: Reviving the Presumption of Remedies Under Implied Rights of Action*, 46 ARK. L. REV. 715, 733 (1993) (citations omitted). "Because these three statutes were explicitly patterned after one another and share the common objective of prohibiting discrimination by institutions that receive federal financial assistance, courts have concluded that they are to be construed and applied in the same manner." *Id.* at 734 (citations omitted).

154. 463 U.S. 582 (1983). *Guardians Association* involved an employment discrimination suit brought by minority members of a city police department. The complaint alleged that the department's use of several written examinations to make entry-level appointments had a discriminatory impact on the scores and pass-rates of minorities and were not job related. *Guardians Ass'n*, 436 U.S. at 585. All of the plaintiffs in this case had passed the exam and had been hired by the department. *Id.* However, because the plaintiffs were hired in the order of test score, they had less seniority than similarly situated white police officers. *Id.* Subsequently, the department was forced to lay off several officers and did so on a "last-hired, first-fired" basis causing the minority officers to be laid off first. *Id.* The plaintiffs filed a class action alleging violations of both Title VI and Title VII primarily challenging the discriminatory impact of the examinations on minority officers. *Id.* at 586.

155. *Petaluma City Sch. Dist.*, 830 F. Supp. at 1574 (citing *Guardians Ass'n*, 463 U.S. 582). The Supreme Court in *Guardians Association* found that Title VI was enacted pursuant to the Spending Clause. The district court quoted Justice White who stated that:

[T]he Court has more than once announced that in fashioning remedies for violations of Spending Clause statutes by recipients of federal funds, the courts must recognize that the recipient has 'alternative choices of assuming the additional costs' of complying with what a court has announced is necessary to conform to federal law or of 'not using federal funds' and withdrawing from the federal program entirely . . . I put aside for present purposes those situations involving a private plaintiff who . . . has been intentionally discriminated against by the administrators of the program. In cases where intentional discrimination has been shown, there can be no question as to what the recipient's obligation under the program was and no question that the recipient was aware of that obligation. In such situations, it may be that the victim of the intentional discrimination should be entitled to a compensatory award, as well as to prospective relief in the event the State continues with the program."

Petaluma City Sch. Dist., 830 F. Supp. at 1574 (quoting *Guardians Ass'n*, 463 U.S. at 596-

covery for unintentional violations of Title VI to injunctive relief.¹⁵⁶ The district court believed that the same rule should apply in Title IX cases because Title IX, like Title VI, is also a Spending Clause statute and because it was based upon Title VI.¹⁵⁷ Furthermore, the court believed that the Supreme Court in *Franklin* laid down the rule that recovery of damages under Title IX is limited to claims for "intentional discrimination" and that respondeat superior liability exists under Title IX so that an educational institution may be found to have intentionally discriminated when one of its agents is found to have done so.¹⁵⁸ Based on its reading of these cases, the district court found that damages may not be recovered in a Title IX action unless a plaintiff can allege and show that the school district intentionally discriminated against the student on the basis of sex.¹⁵⁹

V. THE FUTURE OF TITLE IX AND STUDENT-TO-STUDENT SEXUAL HARASSMENT

A. *Is Hostile Environment Sexual Harassment Recoverable Under Title IX*

When viewing the language of Title IX, one can clearly see that

⁹⁷ (citations omitted).

¹⁵⁶. *Petaluma City Sch. Dist.*, 830 F. Supp. at 1573 (relying on *Guardians Ass'n*, 463 U.S. at 582). What the district court failed to point out, however, is that *Guardians Association* was a plurality opinion in which only five of the justices agreed that "intent" must be proven in order for a Title VI plaintiff to recover compensatory damages. *Guardians Ass'n*, 463 U.S. at 582. Justice White wrote the majority opinion in which Chief Justice Burger and Justices Powell, Rehnquist, and O'Connor concurred in the judgment. *Id.* Justice Powell, joined by the Chief Justice and Justice Rehnquist, filed a separate opinion concurring with the judgment. *Id.* at 607 (Powell, J., concurring). Justice O'Connor also filed a separate concurring opinion. *Id.* at 612 (O'Connor, J., concurring). However, four justices dissented—Justices Marshall, Stevens, Brennan and Blackmun. Justice Marshall filed his own separate dissent, while Justice Stevens, joined by Justices Brennan and Blackmun filed another. *Id.* at 615 (Marshall, J., dissenting); *Id.* at 635 (Stevens, J., dissenting).

¹⁵⁷. *Petaluma City Sch. Dist.*, 830 F. Supp. at 1574.

¹⁵⁸. *Id.*

¹⁵⁹. *Id.* at 1576. The court specifically stated that:

[N]o damages may be obtained under title IX (merely) for a school district's failure to take appropriate action in response to complaints of student-to-student sexual harassment. Rather, the school district must be found to have intentionally discriminated against the plaintiff student on the basis of sex. The school's failure to take appropriate action . . . could be circumstantial evidence of intent to discriminate. Thus, a plaintiff student could proceed against a school district on the theory that its inaction (or insufficient action) in the face of complaints of student-to-student sexual harassment was a result of an actual intent to discriminate against the student on the basis of sex.

student-to-student sexual harassment violates this statute. Surely one who is subjected day after day to such harassment is being denied a "benefit of" or "subjected to discrimination under" educational program.¹⁶⁰ As is indicated by the AAUW study discussed above, students report that they feel self-conscious and unsure of themselves following harassing behavior.¹⁶¹ This loss of self-confidence, or esteem, can lead to impaired academic progress; which, in turn, will eventually lead to diminished career goals and lower earning potential, especially for women, who appear to suffer more severe consequences than men who have been subjected to harassment.¹⁶² Clearly then, by ignoring sexual harassment among students, a school, although not itself harassing the student, through its inaction is effectively condoning activity that is specifically prohibited by Title IX.¹⁶³

Furthermore, while the courts are only beginning to address the issue of recovery for hostile environment sexual harassment under Title IX, there appears to be a developing trend to allow such recovery. This trend is being fed by the Supreme Court's implicit allowance of recovery for hostile environment harassment in *Franklin. Patricia H. and Petaluma* are the only cases that have ruled on this issue since *Franklin* was handed down, and both cases allowed recovery for hostile environment sexual harassment basing their decisions upon the Supreme Court's posture, specifically, the Supreme Court's reliance on *Meritor* in deciding that sexual harassment was sex discrimination for the purposes of Title IX.¹⁶⁴ By citing to *Meritor*, the Court can be viewed to have implicitly approved, for Title IX purposes, at a minimum, the tests for sexual harassment that were adopted in the Title VII case. This means, therefore, that both quid pro quo and hostile environment harassment can be legitimately found to be prohibited under

160. 20 U.S.C. § 1681 (1988).

161. See *HOSTILE HALLWAYS*, cited at note 9, at 15. See also notes 12, 14-15, 19-21 and accompanying text.

162. See notes 17, 19-21 and accompanying text.

163. *Sherer*, cited at note 42, at 2154.

164. *Franklin v. Gwinnett County Pub. Schs.*, 112 S. Ct. 1028, 1037 (1992). Specifically the Court stated:

Unquestionably, Title IX placed on the Gwinnett County Schools the duty not to discriminate on the basis of sex, and "when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor discriminates on the basis of sex." . . . We believe that the same rule should apply when a teacher sexually harasses and abuses a student. Congress surely did not intend for federal monies to be expended to support the intentional actions it sought by statute to proscribe. *Franklin*, 112 S. Ct. at 1037 (quoting *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 64 (1986)).

Title IX.

Furthermore, as the court in *Patricia H.* noted,

[T]he importance and function of environment is different in academia than in the workplace A nondiscriminatory environment is essential to maximum intellectual growth and is therefore an integral part of the educational benefits that a student receives. A sexually abusive environment inhibits, if not prevents, the harassed student from developing her full intellectual potential and receiving the most from the academic program.¹⁶⁵

Given all of this, it is likely that courts will now follow the lead of *Patricia H.* and *Petaluma* in allowing recovery under Title IX for hostile environment sexual harassment.

B. *What Will a Plaintiff Need to Show When Bringing a Claim of Student-to-Student Sexual Harassment?*

Given the posture of the lower courts and that of the Supreme Court, the decision in *Petaluma* is the likely model that will be adopted in student-to-student harassment cases by the majority of courts that allow recovery for hostile environment sexual harassment under Title IX. Therefore, by looking at *Patricia H.* and *Petaluma* together, one can deduce what will need to be shown under any student-to-student sexual harassment case.

When analyzing these cases, it appears that one will need first to establish the existence of a "hostile educational environment."¹⁶⁶ In determining whether such an environment has been created, the court must consider the "'age of the victim(s); the frequency, duration, repetition, location, severity, and scope of the acts of harassment; [and] the nature or context of the incidents.'"¹⁶⁷ Second, once such an environment is found to have existed, the court then needs to determine whether the school took "'immediate and appropriate' action 'reasonably calculated' to remedy the harm complained of."¹⁶⁸ Finally, if the plaintiff seeks to recover compensatory damages, as opposed to injunctive relief, the complaint will need to allege that the school intentionally discriminated against

165. *Patricia H.*, 830 F. Supp. at 1293 (quoting Ronna Greff Schneider, *Sexual Harassment and Higher Education*, 65 TEX. L. REV. 525, 551 (1987)).

166. *Patricia H.*, 830 F. Supp. at 1296.

167. *Id.* (quoting Request for Judicial Notice, Ex. N at 2). The court adopted a "reasonable student" standard. This standard is also promulgated by the OCR. *Id.* For a detailed discussion of whether or not a court in student-to-student sexual harassment cases should use a "reasonable student" standard, see Strauss, cited at note 22.

168. *Patricia H.*, 830 F. Supp. at 1297 (citations omitted).

the plaintiff on the basis of sex.¹⁶⁹ Intentional discrimination may be shown circumstantially merely by the school's failure to take appropriate action.¹⁷⁰ "Thus, a plaintiff student could proceed against a school district on the theory that its inaction (or insufficient action) in the face of complaints of student-to-student sexual harassment was a result of an actual intent to discriminate against the student on the basis of sex."¹⁷¹

VI. ALTERNATIVE SOLUTIONS TO ENDING PEER SEXUAL HARASSMENT — STATE LEGISLATION

In an attempt to end sexual harassment in the schools, several states have enacted legislation specifically dealing with the situation. Minnesota was the first state to break ground in this area when it amended its discrimination statute to include "unwelcome sexual advances" or "physical conduct or communication of a sexual nature" that creates "an intimidating, hostile, or offensive . . . environment" at work or in school.¹⁷² Subsequently, Minnesota also passed a law requiring school boards to adopt sexual harassment policies.¹⁷³ A definition of sexual harassment, along with reporting procedures and penalties for violations must be set forth in these policies.¹⁷⁴

In California, a law similar to Minnesota's went into effect on January 1, 1993. California's law defines peer sexual harassment as "unwelcome sexual advances, requests for sexual favors and other verbal, visual or physical conduct of a sexual nature" that are severe enough to impact negatively on an individual's academic performance or to create "an intimidating, hostile or offensive . . . educational environment."¹⁷⁵ While the two statutes are aimed at preventing the same behavior, one big difference exists between the two: California's law covers only students in the fourth grade or higher while the Minnesota law covers all students from kindergarten on.¹⁷⁶ Like the Minnesota law, however, the California stat-

169. *Petaluma City Sch. Dist.*, 830 F. Supp. at 1576.

170. *Id.*

171. *Id.*

172. MINN. STAT. ANN. § 363.01.41 (West 1991).

173. MINN. STAT. ANN. § 127.46 (West Supp. 1994). All Minnesota school boards were to institute sexual harassment policies by the beginning of the 1991 school year. *Id.*

174. *Id.*

175. CAL. EDUC. CODE § 212.5 (West Supp. 1994).

176. Shalit, cited at note 5, at 13. Sex-equity specialist for the Minnesota Department of Education, Sue Sattel stated that "[Minnesota doesn't] believe that anyone should be exempt from the range of discipline available to correct the situation." *Id.*

ute requires the school districts to adopt and distribute written sexual harassment policies.¹⁷⁷ Also, the statute permits schools to suspend or expel students who have sexually harassed other students.¹⁷⁸

Additionally, in Minnesota, the Department of Human Rights¹⁷⁹ has thus far ruled against two school districts in cases involving peer sexual harassment. In the first case, the plaintiff alleged that the Duluth School District failed to paint over crude bathroom-wall graffiti that was written about her.¹⁸⁰ This case was settled in 1991 and the school district paid the plaintiff \$15,000 in damages.¹⁸¹ Following this settlement, the state ruled against the Chaska School District for failing to seriously address a complaint by a female student that male students were circulating a list of the twenty-five girls with whom they would like to have sexual intercourse.¹⁸² As a result of these cases, Minnesota school districts are strictly enforcing the anti-discrimination statute to prevent sexual harassment in their schools.¹⁸³

While California and Minnesota are the only states thus far to have legislation covering peer sexual harassment, other states are following suit. For example, Pennsylvania, on October 13, 1993, introduced a bill that would require each school board to adopt writ-

177. CAL. EDUC. CODE § 212.6.

178. CAL. EDUC. CODE § 48900.2 (West 1993).

179. The Department of Human Rights is the state agency that investigates complaints and enforces compliance with the Minnesota sexual harassment legislation. MINN. STAT. ANN. § 363.05 (West 1991).

180. Katherine Lampher, *Reading, 'Riting, and 'Rassment*, Ms., May-June 1992, at 90, 90. The Duluth School District additionally agreed to "post a revised sexual harassment policy in all schools, provide training for students and staff, and check bathroom walls daily for graffiti." *Id.*

181. Jane Gross, *Schools Are Newest Arenas for Sex-Harassment Issues*, N.Y. TIMES, Mar. 11, 1992, at B8.

182. Lampher, cited at note 180, at 90. This case is illustrative of the fact that communities and schools are failing to react to the sexually harassing behavior in a manner that one would expect. In this case, the *Chaska Herald* wrote a story about the incidents alleged in the plaintiff's complaint and the sexual harassment problem that existed at the school. Sherer, cited at note 40, at 2141 n.119 (citing Doug Grow, *Lessons of Harassment Also Taught in Chaska*, STAR-TRIB. (St. Paul, Minn.), Oct. 13, 1991, at 1B). The author of the article wrote that the Human Rights Department had ruled that the school was negligent in failing to take action against the boys who had circulated a list of the 25 most "fuckable" girls. *Id.* The editor apparently used the obscenity to demonstrate to the readers the seriousness of the situation. *Id.* However, most people were more outraged with the fact that the editor used this word than with the fact that the female students had been harassed everyday with this type of behavior. *Id.*

183. In the 1991-92 school year alone, more than 1000 students in Minneapolis were suspended or expelled on sexual harassment charges. Shalit, cited at note 5, at 13.

ten harassment policies.¹⁸⁴

VII. AVOIDING LIABILITY: WHAT CAN A SCHOOL DO?

Absent state directive, a school may, on its own, adopt harassment policies and procedures. By doing so, a school can limit or possibly avoid liability under Title IX. Educational publications have recommended tactics that school districts can use to avoid or limit liability in employment related sexual harassment. While these policies may not focus on peer sexual harassment, there is no reason that they cannot be adopted, with minor modifications, to assist schools in avoiding liability. Generally, it is suggested that a school adopt a program that covers four main areas.¹⁸⁵

First, a school should adopt and publish a policy against sexual harassment, including peer sexual harassment.¹⁸⁶ This policy should contain several things. It should include a clear definition of sexual harassment and give examples of actions that may constitute peer sexual harassment.¹⁸⁷ The policy should communicate that sexual harassment is against school policy and against the law and that the school district will not tolerate any form of sexual harassment.¹⁸⁸ A detailed description of the internal "chain of communication" for students to use in reporting harassment is a

184. Pa. H.B. 2185, 176th Gen. Assembly, § 5.4(d)(1) (1993). The bill provides that: Each school board shall adopt a written harassment policy and sexual harassment policy. This policy shall apply to pupils, teachers, administrators and other school personnel, and shall include reporting procedures and disciplinary actions relating to violations of the policy. The policy must be conspicuously posted in each school building and included in each school's student handbook on school policies.

Id. The same bill was introduced to the General Assembly on December 9, 1991. Pa. H.B. 2255, 175th Gen. Assembly § 5.4(d)(1) (1991).

185. See Samuel J. Bresler & Rebecca Thacker, *Four-point Plan Helps Solve Harassment Problems*, 2 EDUC. MGMT. GUIDELINES 1 (Pa. Sch. Boards Ass'n No. 19, Oct. 1993).

186. Bresler, cited at note 185, at 1; Lisa A. Brown & Kelly Frels, *Investigating and Preventing Claims of Sexual Harassment*, INQUIRY & ANALYSIS 3 (Nat'l Sch. Board Ass'n Council of Sch. Attorneys, July, 1992); Michael I. Levin, *Keys to Eliminating Liability in Sexual Harassment Suits*, PA. SCH. BOARD ASS'N (Dec. 1992) at 30, 31.

187. Bresler, cited at note 185, at 1; Brown, cited at note 186, at 3. Bresler suggests that the list should include, at a minimum, the following categories of conduct:

1. Physical assaults or other physical conduct of a sexual nature, including unwanted touching.
2. Unwanted sexual advances, propositions or other sexual comments.
3. Displays or publications of a sexual nature anywhere in the [school].
4. Retaliatory action taken against a [student] for discussing or making a sexual harassment complaint.

Bresler, cited at note 185, at 2.

188. Bresler, cited at note 185, at 1; Brown, cited at note 186, at 3.

must in any policy.¹⁸⁹ Further, the school should designate a Title IX coordinator who is in charge of investigating all complaints.¹⁹⁰ Additionally, the school should clearly establish penalties, or a system of penalties, that will be implemented if a student is found guilty of sexually harassing another student.¹⁹¹ The policy should contain deadlines for investigation, and forbid any retaliation against the complainants and provide for penalties against those who retaliate (i.e., the harassing students' friends or other classmates).¹⁹² Finally, the policy should require the investigating official to write a detailed report of the investigation.¹⁹³ This will serve as proof of the fact that an investigation was conducted in the event that a disgruntled student or parent decides to file suit.

Second, the school should develop a complaint procedure that "encourages [students] to come forward with any harassment complaints."¹⁹⁴ The procedure for filing a complaint should be in writing and should be distributed to the students, teachers, administrators, and those who are in charge of handling the complaints.¹⁹⁵ As stated above, the school should also place at least one person in charge of Title IX complaints and this person's role should be made known to all students, teachers, administrators, and staff. Given the delicateness of the situation when young students are involved, the school may want to designate a separate individual as Title IX coordinator for students only and have a different person in charge of Title IX and Title VII complaints involving employees.¹⁹⁶

189. Bresler, cited at note 185, at 2.

190. Brown, cited at note 186, at 3.

191. Bresler, cited at note 185, at 2; Brown, cited at note 186, at 3.

192. Brown, cited at note 186, at 3.

193. *Id.* at 3.

194. Bresler, cited at note 185, at 1. *See also* Brown, cited at note 186, at 3-5.

195. Bresler, cited at note 185, at 2.

196. The school should keep in mind, when placing a person in this role, that: The person charged with this important responsibility should be tactful, considerate and capable of making the complainant feel comfortable. Complaining about sexual harassment is, for many, a painful and embarrassing experience. If the recipient of the complaint is not able to provide a tactful, nonjudgmental investigation, accusers may go outside the organization to file a complaint.

Bresler, cited at note 185, at 2-3. In choosing a Title IX coordinator, Bresler suggests that school personnel should ask the following questions:

- Does the [person] have a hidden personal agenda (e.g., a previously harassed woman may believe that all men accused of sexual harassment are guilty)?
- Has the [person] handled delicate situations well in the past . . . ?

Id. at 3. Additionally, the following questions should be asked:

- Is the person equipped to deal with the emotional and psychological effects that

Third, the school must develop and follow an investigative strategy that immediately and fairly deals with harassment complaints.¹⁹⁷ This strategy should aim to quickly remedy the situation and to protect the privacy of the students involved.¹⁹⁸ The investigation should begin immediately after the complaint is filed and all complaints *must* be investigated.¹⁹⁹ "The school official receiving the complaint should not discourage or embarrass the complainant and should not unilaterally decide that the complainant is unbelievable or too unattractive to have been harassed."²⁰⁰ All evidence should be collected, including any letters, notes, or photographs and both the complainant and the accused should be interviewed.²⁰¹ During the interviews, the coordinator should focus on the specifics, such as what was actually said or done, and not on what either of the parties assumed.²⁰² Finally, the investigator should locate and interview any witnesses to the alleged harassment, including staff, teachers and students.²⁰³

Following the investigation, prompt action should be taken if the accused is found guilty. Additionally, if sexual harassment is found not to have occurred, the coordinator should sit down with the students, individually, and discuss what sexual harassment is and why it did not occur or was found not to have occurred in that particular situation. Also, the accused student should be informed of penalties that will be implemented should he or she retaliate against the accusing student.

Finally, and most importantly, the school should institute an educational program for students and employees alike.²⁰⁴ This program should be geared toward the individual group involved. For instance, with younger students, it may be helpful to use smaller, more intimate groups, whereas with high school students or with teachers and administrators larger groups may work better. Either

harassment has on young people?

- Is the person one the students feel comfortable with and trust?
- Will the person be able to enforce penalties against guilty students?
- Is this person one who can handle irate and emotional parents?
- Can this person handle a potentially hostile community that may not agree with his or her decision to reprimand the harasser?

197. Bresler, cited at note 185, at 1; Brown, cited at note 186, at 3-5.

198. Bresler, cited at note 185, at 1, 3; Brown, cited at note 186, at 3.

199. Bresler, cited at note 185, at 3; Brown, cited at note 186, at 3.

200. Brown, cited at note 186, at 3.

201. *Id.*; Bresler, cited at note 185, at 3.

202. Brown, cited at note 186, at 3.

203. *Id.* at 4.

204. Bresler, cited at note 185, at 3.

way, each session should emphasize what sexual harassment is and that it is both against the school policy and against the law. Additionally, at the end of each session, the students should be permitted to ask questions of the instructors. It must be kept in mind that it is only with adequate education that the students will come to recognize and understand peer sexual harassment.

VIII. CONCLUSION

As the AAUW has stated: "Sexual harassment is clearly and measurably taking a toll on a significant percentage of students' educational, emotional, and behavioral lives."²⁰⁵ Given these effects, America can no longer choose to ignore peer sexual harassment and action must be taken. While Title IX offers one alternative, its coverage of peer sexual harassment is uncertain and alternative solutions need to be developed. The schools need to take an active role in preventing and stopping sexual harassment. This will be done most effectively through the development of procedures and policies aimed at ending sexual harassment. More importantly, the schools need to institute educational programs for students and faculty alike, for without education the procedures and policies being promulgated are worthless.

On another level, state and federal legislatures need to adopt strong anti-discrimination policies specifically aimed at sexual harassment in the educational context. While Title IX may afford some protection to victims, the development of a strong body of case law against student-to-student sexual harassment has barely begun. It most likely will be years until the area is settled and enormous amounts of time and money will be expended in the process. In order to hasten this process, Congress must develop legislation that will serve two purposes. First and foremost, any statute aimed at preventing student-to-student sexual harassment must have the best interests and protection of the students in mind. Without this as its primary goal, any action by Congress will fall short of ending the terror that is being inflicted on the children of America. Second, the legislation should also keep in mind the well-being and financial stability of the schools. If the schools are subjected to unlimited liability for peer sexual harassment, their financial status would be devastated. One must always keep in mind that the schools need money in order to provide a solid education to their students, and opening the schools up to extensive liability

205. HOSTILE HALLWAYS, cited at note 9, at 21.

could severely cut back on the funds that are needed to support the general educational process.

Absent legislative directive, whether state or federal, plaintiffs must rely on Title IX for their protection. As stated above, any complaint filed under Title IX seeking to recover damages for student-to-student sexual harassment needs to demonstrate three things: (1) the existence of a hostile environment; (2) the lack of appropriate and immediate action on the part of the school to end the harassment; and (3) intentional discrimination on the basis of sex. Whether other courts will follow the lead of *Petaluma* cannot yet be determined; however, the general posture of the courts at this time indicates that they will rely on *Petaluma* in further developing a body of law against student-to-student sexual harassment.

No matter which method one prefers, it cannot be denied that student-to-student sexual harassment is a pervasive problem in America today, and that we, as a country, must take a stand against it. "And although girls are experiencing more harassment—and suffering graver consequences—in the end, sexual harassment is everyone's problem. For when children's self-esteem and development are hampered, the repercussions echo throughout society."²⁰⁶

Stacey R. Rinestine